

U.S. Department of Homeland Security

20 Mass, Rm. A3042, 425 I Street, N.W.  
Washington, DC 20529



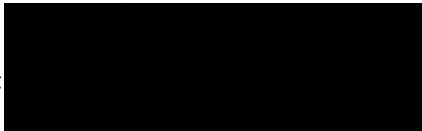
U.S. Citizenship  
and Immigration  
Services

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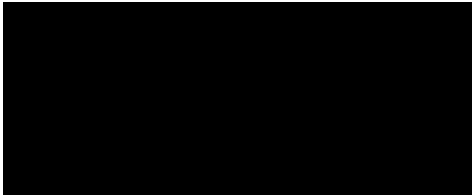
FILE: SRC 02 202 50118 Office: TEXAS SERVICE CENTER Date: **AUG 19 2004**

IN RE: Petitioner:  
Beneficiary:



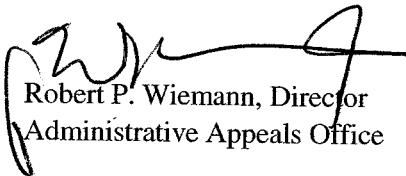
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

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prevent clearly unwarranted  
invasion of personal privacy**

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**DISCUSSION:** The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner claims that it is a branch of the foreign entity and also that the beneficiary owns a 50 percent portion and Farhan Zakaria Siddique owns a 50 percent portion of the petitioner. It claims it is a retail sales business. It seeks to extend the employment of the beneficiary temporarily as its president/director. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner claims that the foreign entity in this matter is Farhan Aziz Associates that is owned 100 percent by Farhan Zakaria Siddique and is located in Karachi, Pakistan.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner contends that it is improper to deny a petition on grounds not mentioned in a request for additional evidence. Counsel also contends that the beneficiary is qualified for L visa status as an executive.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) further states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, that involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of position held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

Counsel's contention that the director's decision was improper, as she did not raise the issue of the beneficiary's lack of managerial or executive capacity in her request for additional evidence, is incorrect. In fact, the director is not obligated to base her decision solely on those issues addressed in the request for evidence. In the instant matter, the petitioner is granted an automatic right to appeal the decision of the service center. *See* 8 C.F.R. § 103.3. Therefore, the petitioner is given an opportunity to establish eligibility in the appropriate forum, that being the AAO. The fact that the director did not indicate in the request for additional evidence that she would later address the issue of the beneficiary's managerial or executive capacity in the denial in no way precludes the petitioner from establishing eligibility for the desired immigration benefit. Although Citizenship and Immigration Services (CIS) often issues a notice requesting additional evidence prior to denying a petition, there are no statutes, regulations, or case law precedents that guarantee the petitioner that the only issues in a potential denial will be those that were previously addressed in the request for additional evidence.

The issue in this proceeding is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner stated that the beneficiary would "[d]irect and oversee day to day operations of corporation. Develop, expand and direct corporate policy, protocols, investments, sales and marketing." The petitioner also submitted a quarterly wage report for the quarter ending March 31, 2002. The quarterly wage report showed that the petitioner employed the beneficiary and one other individual at salaries of \$4,500 and \$5,750 respectively for that quarter. The report also showed one individual employed part-time or full-time at minimum wage and eight individuals employed part-time. The petitioner also submitted its 2001 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return. The 2001 IRS Form 1120 shows \$420,283 in gross receipts and \$54,295 paid in salaries.

As counsel observed, the director did not request further evidence regarding the limited description of the beneficiary's duties or evidence establishing the petitioner's number of employees and their role in the petitioner's organizational hierarchy.

The director observed that the petitioner had spent less than \$55,000 on compensation of officers and payment of salaries. The director determined that the beneficiary would not be engaged primarily in executive duties and that the majority of the beneficiary's work would be spent on the non-executive, day-to-day operations of the business. The director concluded that the petitioner's business had not expanded to the point where the services of a president/director would be required.

On appeal, counsel for the petitioner asserts that the beneficiary's responsibilities as the president and director of the petitioner are to "[d]irect and oversee operation. Establish policies and procedures for marketing. Develop, implement and revise as necessary company policies, procedures and business plans." Counsel contends that the beneficiary oversees a sales manager, who in turn, oversees the assistant manager, who in turn, supervises the sales associates. Counsel submits an organizational chart and IRS Forms W-2, Wage and Tax Statement, for 20 employees for the year 2002. The organizational chart shows the beneficiary as director/president, a sales manager, an assistant manager, and six sales associates. The IRS Forms W-2 show that in 2002 seventeen of the petitioner's employees were paid less than \$2,031, the beneficiary was paid \$18,000, the sales manager was paid \$21,000, and the assistant manager was paid \$9,460. Counsel asserts this evidence demonstrates that the denial was in error.

Counsel's assertion and the evidence submitted on appeal are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

On review, the petitioner has provided a nonspecific description of the beneficiary's duties. The petitioner initially indicated that the beneficiary would direct and oversee the petitioner's day-to-day operations and develop, expand and direct corporate policy, protocols, investments, sales and marketing. These duties paraphrase elements of the statutory definition of managerial and executive capacity without conveying an understanding of the beneficiary's actual daily duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Counsel's description of the beneficiary's duties on appeal likewise does not describe the beneficiary's actual daily duties. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava, Id; Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

Moreover, counsel's claim that the beneficiary oversees a sales manager, who in turn oversees an assistant manager, who in turn oversees sales associates, is not persuasive. The IRS Forms W-2 issued by the petitioner show that it has intermittently employed 17 individuals. The IRS Forms W-2 do not show when the 17 part-time employees worked for the petitioner and whether they were working for the petitioner when the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Further, the wages listed on the IRS Forms W-2 for the beneficiary, the sales manager, and assistant sales manager are the only salaries that could support a conclusion that these individuals were employed full-time for the year.

On review of the record, the petitioner has not established that it employs sufficient personnel to relieve the beneficiary from performing primarily non-qualifying duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner has not established that the beneficiary's assignment has been and would be primarily managerial or executive.

Beyond the decision of the director, the record is not persuasive in demonstrating that the foreign and U.S. entities are qualifying organizations. See 8 C.F.R. § 214.2(l)(1)(ii)G). The petitioner asserted in its petition that the U.S. company is a branch of the foreign entity. The petitioner also stated that the beneficiary and Farhan Zakaria Siddique each own 50 percent of the petitioner. A branch office means an operating division or office of the same organization housed in a different location. See 8 C.F.R. § 214.2(l)(1)(ii)(J). A branch of a foreign company is bound to the parent company through common ownership and management. Probative evidence of a branch office would include a state business license establishing that the foreign entity is authorized to engage in business activities in the United States as a branch office and copies of IRS Form 1120-F, U.S. Income Tax Return of a Foreign Corporation. In this matter, the evidence of record demonstrates that the United States entity is not a branch office of the foreign entity.

The petitioner has not established that it is a subsidiary or an affiliate of the foreign entity. The petitioner has not established that one individual owns a majority interest in the petitioner and the foreign entity, and controls both companies. The petitioner has not provided stock certificates, articles of incorporation, or other evidence that it was actually incorporated. Although the petitioner has filed IRS Forms 1120, the 2002 Form 1120 at Schedule L, Line 22(b) shows that the value of the petitioner's common stock increased from 3,000 to 5,000 in that year. The petitioner has not explained the cause of the increase in the value of the stock. The lack of independent consistent information in the file regarding the petitioner's business classification and ownership casts doubt on the validity of the petitioner as a separate and distinct legal entity from its owners or stockholders. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). For this additional reason, the petition will not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.